

FEBRUARY 26. 1767.

20th Feby 1767
Refuse

and a man on his side, and I am not of the
 Unto the Right Honourable, the Lords of Council and Session,
 for a joint petition, that the petitioners have petitioned
 then to law, that they may be relieved from their
 certain, my Lord, petitioners would not have done
 any view of taking advantage, as he never showed a dis-
 position of that kind.

P E T I T I O N
 Your Lordships giving your petitioners
 for her house, may prevent any petition from naming
 a joint petition, without naming the yearly rent. And
 your Lordships cannot have a more favorable opportunity
 to correct an error of that kind than at present, when an
 estate of 1000 l. a year goes out of the family to an entire
 stranger, the petitioners being your Lordships

ANDREW STEPHENSON Merchant
 in Glasgow.

than her own to have drawn this petition; but she was
 assisted, as it is to near the end of the petition, it might have
 HUMBLY SHEWETH,

THAT your petitioner is creditor to *John Morison*
 merchant in Glasgow, in the sum of 95 l. 3 s. ster-
 ling, by a bill duly protested and registered.

Morison having become bankrupt, your petiti-
 oner laid on an arrestment in the hands of *John Dallas* cop-
 permith in Glasgow, father-in-law to *Morison*, in order
 that a certain sum, provided to the said *Morison* in his con-
 tract of marriage with Mr. Dallas's daughter, might be
 made forthcoming to your petitioner.

Having brought a process to this effect before the Lord
Stonefield Ordinary, his Lordship, after hearing the ques-
 tion debated by parties procurators, was pleased, on the 12th Feb. 12.
 of February 1767, to pronounce the following interlocu- 1767.
 tor: "Having considered the debate, sustains the defence;
 "affoulizes the defender *John Dallas* from the conclusion
 "of payment of the principal sum, but finds him liable
 "in the current annualrents thereof, and proceedings due
 "at the time of using the arrestment, and decerns."

Against
 gether with the expenses of this process.
 According to justice, &c.

M. CATHNES

Against this interlocutor, a representation was preferred by your petitioner, praying the Lord Ordinary to find, that your petitioner has a just claim to the sum for which he pursues; or at least, if Mr. Dallas should be allowed retention of the same, that he should be obliged to secure it to your petitioner, in case of Mrs. Morison's decease.

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His Lordship, on the 19th of February 1767, was pleased to refuse this representation, and adhere to the interlocutor complained of.

Your petitioner would now humbly submit his cause to the review of your Lordships.

And he would, with all deference, maintain, that the defences stated for Mr. Dallas, however plausible they may be in appearance, cannot be sustained by your Lordships, when the doctrine upon which they are founded is maturely considered.

Mr. Dallas has said, that there was here a mutual contract, of which Morison did not, nor could not implement his part: That there was here a *causa data, causa non secuta*, and therefore Mr. Dallas could not be obliged to implement his part, by paying the money for which he had contracted, as that money must be retained in security for the provisions granted by Morison to his wife in the contract of marriage.

Your petitioner does humbly contend, that this defence is without any solid foundation: It is true, that in every contract there is a mutual obligation, which indeed constitutes its very essence; and it would be contrary both to law and equity, that one party should be bound, and the other remain free.

But your Lordships will be pleased to consider, that this idea of a mutual contract remains only while it is in its primary state, and between the parties contractors, who may, and ought to be liable to each other in performance of their several stipulations; and if any of the parties should find himself

himself, not in a condition to fulfil what he has engaged to do, then, no doubt, he should, of consent, recede from the mutual contract; and if he refuses to do, and the other party should bring a suit against him, a judge would be well warranted to annul such a contract.

But it is submitted to your Lordships, if the case is not greatly altered, when a right arising from a contract, of which the original constitution is a mutual obligation upon the parties contractors, is afterwards transferred to a third party.

In that event, it is pleaded, that the primary idea of a mutual contract no longer subsists. It is then entirely out of the hands of the original contractors. They can no longer refuse, nor can one of them retain a sum for which he stands engaged, in prejudice of a third party who has acquired a right to it.

It may be said, that if this were to hold in the case of mutual contracts, it would indeed be *fraudem patere legi*, it would, indeed, disappoint the very intention of a mutual contract; for no sooner would a party be sensible of his inability to perform his part of the contract, than he would transfer his right arising from that contract to a third party, probably to some confident person; and, in that manner, would obtain prestation from the other contractor, when he himself has performed nothing in consideration of it.

But your Lordships will see through the fallaciousness of this reasoning; for your petitioner does not plead to its fullest extent the principle which he has advanced; he does not say, that it is subject to no restrictions, and that your Lordships cannot interpose your equitable powers in moderating this, as well as other principles of law, from a consideration of the particular circumstances of a cause.

Should it be evident to the court, that there was a *mutuum* in a transaction; and that a right arising from a mutual

tual contract, had immediately on the completion of the bargain, been transferred to a third party, your Lordships would, in that case, apply your authority to void so dishonest a connivance. You would consider the parties in the original contract as mutual debtors to each other. And you would judge in the spirit of those wise and salutary laws, by which debtors are prohibited from alienating their substance in fraud of their creditors.

Were it, therefore, made appear to your Lordships, that there was *ob injuria*, a design to cheat in a mutual contract, that a third party was brought in as an accomplice of the villainy, and that the whole was a train of dishonesty, your Lordships could have no difficulty to rescind so shameful a transaction.

But if your Lordships see a mutual contract fairly entered into, from a mutual confidence which the parties have in each other, and that a right arising from this contract, is honestly transferred to a third party, who accepts of it *bona fide*, and for a valuable consideration; your Lordships, in such a case, will not see any just reason to free an original contractor from the transferred prestations; he may, no doubt, have recourse against his friend in whom he trusted, when he entered into the bargain; but he cannot refuse to pay him to whom the right is transferred, who is to be looked upon in the light of an onerous creditor.

Your petitioner must, with all submission, contend, that if the doctrine upon which he pleads is not true, commerce could hardly be carried on, or, at least, would be narrowed to a degree incompatible with those liberal and enlarged views, which will ever be the glory of such a nation as ours.

If the doctrine upon which he pleads is not true, then must trade be confined to man and man; an original contractor

tractor only is safe, and nobody will accept of a transference upon the credit of another. With what fatal effects this would be attended, your Lordships will judge. And therefore, a tenderness for an original contractor, will not weigh too much with you; for an equal tenderness is due to a third party, supposing them both equally in *bona fide*.

An original contractor is supposed to be very well acquainted with the circumstances and character of the person with whom he contracts, or, at least, is supposed to make a strict scrutiny concerning him.

A third party is not supposed to know so much of him from whom he purchases a transference; he proceeds, in some measure, upon the consideration, that the transferer has a trust reposed in him by the original contractor, and therefore must be a man of good credit; so that the third party has a greater claim to favour than the original contractor.

And your petitioner will make a supposition, as a counter-part to that of his adversary, and, he hopes, it will appear to be a supposition as probable.

He will suppose a collusion between the original parties, in a mutual contract. He will suppose them neighbours, living in the same town, relations, and confident persons. He will suppose the one to be in very opulent circumstances, and the other very needy; a mutual contract is entered into between these persons. The character and credit of the opulent man is known all over *Britain*, so that the other has no difficulty to find an opportunity of transferring his right at a very high price, which is immediately paid. It afterwards comes out, that he is not able to implement his part of the contract. Could the opulent man, in that case, refuse to satisfy a right now vested in a stranger? or, if any body should suffer, should it be a stranger, who proceeded *bona fide* upon the most rational grounds, or the opulent o-

original contractor, who must be supposed to know well what he was about, and who was really the occasion of the stranger's embarking in the transaction.

Your Lordships would not surely give countenance to such machinations, or allow an honest stranger to be ruined by the artifice of a fraudulent decoy duck.

Whatever the case may be, your Lordships can be at no loss to decide; since, wherever fraud can be discovered, your equity will always find room for a remedy; but when no fraud appears, your petitioner must humbly maintain, that a third party is well founded in claiming a right, originally in a mutual contract, and now transferred to him; and as, by his arrestment, he has acquired the right originally competent to *Morison*, he must plead, that this right, as it now stands, shall be valid and effectual.

But your Lordships will consider, in the *second* place, that a contract of marriage is different from all other contracts, as there, the wife's portion is not granted in consideration of the conventional provisions, but in contemplation of the marriage itself, of that mysterious union, which is not subject to the gross rules of calculation.

Marriage is not a Rule of Three, where we can say, If 500 *l.* give so much, what will 1000 *l.* give? No; there is in marriage a *pretium affectionis*, a love and regard between parties, which cannot be defined. A value may be put upon diamonds; but your Lordships cannot set a price upon a pair of fine eyes, or upon any other personal charm, far less upon those elegant accomplishments, or those amiable qualities of the mind, which win the heart of a lover, and must receive an estimation according to the warmth of his fancy.

So your Lordships see, in the course of human life, that an agreeable young fellow of worth and spirit, who has not a shilling, will often obtain in marriage an heiress of great fortune, and become lord of all she has. And a gentleman

A man of an opulent estate will dispose the woman he likes, although she can hardly buy her wedding cloaths. In both these cases, contracts of marriage are made; but will it be said, that they should be void and null on the one part, because no consideration, — no pecuniary consideration, — is performed on the other part?

Such a plea, it is humbly apprehended, can never be intended to by your Lordships; and therefore, in the present case, there is not a *causa data, causa non secuta*, marriage is the *causa*, and marriage has followed.

In the case of *Angus* against the representatives of *Wemyss*, 3d *August* 1758, the Lords found, "Bankruptcy of the husband not relevant to reduce a marriage contract after the death of the wife, and failure of the issue of the marriage." And the reasonings of the bench, as collected in the decisions, are, that marriage-contracts are attended with different circumstances from all other contracts. In common cases, a contract can be reduced, and parties restored in *integrum*, but that cannot be done after marriage has followed on a nuptial contract. — Again, in marriage-contracts, the mutual prestations are not the adequate causes of each other: The marriage is properly the cause of all the stipulations on either side, which are only conventional settlements in place of the legal rights arising from marriage. — A man may provide his wife though she brings no portion, and the wife's want of it will not prejudice her legal rights. A contract of marriage is not like a bargain of sale, that cannot subsist without a price, the marriage itself being an onerous cause for the whole provisions.

Such have been the reasonings of your Lordships upon this point, and your petitioner apprehends, that you will not now see any reason why you should be of a different opinion.

Your petitioner is aware of the decision in the famous case of the *Creditors of Watson contra Cameron*, 4th *July*

Aug. 3d.
1758.

July 4.
1732.

1732.

1732, where the Lords allowed retention of the portion until the wife should be secured in a liferent.

Your petitioner has the greatest deference for the judgments of this court; but he is advised, that a single decision cannot be considered as sufficient to establish a rule of judging, far less to establish a principle of law, especially when contrary decisions are upon record.

And, therefore, the petitioner would beg leave to remind your Lordships of the case of *Turnbull contra Her husband's creditors*, November 25th 1709; where the Lords found, that the creditors had a *jus quasitum* by the marriage, on the fund of their debtor's wife's jointure. For, if this were not the case, wives might be as prodigal as they pleased, and afterwards retain a fund for their provisions, in prejudice of lawful creditors, who, upon the faith of that fund, had advanced money to the husband.—And, as a wife takes her husband for better and for worse, as she shares his good fortune, she must also share his bad fortune, and bear patiently these accidents of providence. The Lords, therefore, refused to sustain any process of alimony, at her instance, against her husband's creditors, and assilized from it, whatever might have been, if the debate had only been between her husband and her.

This decision is very fully collected by My Lord Fountainhall, and will surely have great weight with your Lordships. The last mentioned clause of it, confirms the doctrine advanced in a former part of this petition, that the case is greatly altered, when a right arising from a mutual contract, is afterwards transferred to a third party.

In a contract of marriage, the bride's father follows the faith of his son-in-law: He becomes bound to pay a certain *sum de prasente*, which he cannot refuse to do, on account of any apprehensions he may have of the non-fulfilment of the counter part of the transaction, which has a *tractum futuri temporis*; but he trusts to the diligence of his son-in-law,

law, and to his success in the world, for performance of the agreement stipulated.

Had Mr. Dallas actually paid the money to his son-in-law, he could not insist for a repetition of it. And your petitioner humbly maintains, that he is as ill-founded in his claim for retention; because the accident of the tocher's being paid sooner or later, cannot alter the nature of things.

Had Mr. Morison insisted for payment of his wife's portion when it became due, it is presumed, that his wife's father could not refuse to let him have it; although he might look upon him as extravagant, and in danger of dissipating his substance. For Mr. Morison was not obliged to give an account of his private affairs to his father-in-law, and might certainly have forced from him what he had contracted to pay; would it not then be very hard, if a just and lawful creditor should be in a worse situation?

And it may be farther pleaded, that as the provisions prestable by the husband, have a *fructum futurum temporis*, a father-in-law cannot refuse to fulfil his condition *de presente*; seeing, that it is impossible for him to be sure, that the son-in-law will not be in condition to implement his part of the contract. Had Mr. Morison been a gentleman of estate, bred to no business, and incapable of pushing his way in the world, Mr. Dallas's argument would have a greater shew of reason; but Mr. Morison is a merchant, and Mr. Dallas knew so when he entered into the contract with him: And therefore, supposing Mr. Morison is now bankrupt, nay, supposing him to have been bankrupt at the time of the contract, Mr. Dallas, who knew his character and abilities, might, with a *specie in fructu*, have made the agreement with him he has done, and his daughter been no sufferer at the long-run.

For as Mr. Morison is a merchant, he is, in some measure, a soldier of fortune. He stands upon the wheel of that giddy goddess, and may quickly be able to give his wife more than he ever imagined.

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Your

JAMES BOSWELL

Your Lordships need not be told of the surprising revolutions of trade; and how those who have devoted themselves to commerce, have experienced the vicissitudes of poverty and riches, with a rapidity almost incredible.

Your petitioner humbly hopes, that your Lordships, upon reviewing his cause, will be of opinion, that he has a very sufficient claim to the principal sum contracted for by Mr. Dallas; since, upon the faith of that, the son-in-law got credit to such an extent. And it is proper your Lordships should know, that your petitioner is here only acting as trustee for another; for although the bill in question is indorsed to him, it is, in reality, a debt owing to Mr. Joseph Wimpey merchant in London, for goods furnished by his agent to John Morison.

Your Lordships will therefore be sensible, that Mr. Wimpey was in *optima fide* when he contracted with Morison, who, he was informed, had made an advantageous match; and it therefore, can never be agreeable to equity, that this gentleman should suffer.

At any rate, your petitioner humbly contends, that as the only pretence for retaining this sum is, that it may be answerable for the wife's provisions; your Lordships will think the defender obliged to find security to your petitioner for the money, in case of Mrs. Morison's predeceasing her husband, as then the pretence for retaining it will no longer exist.

Upon the whole, your petitioner is humbly hopeful, that he will receive from your Lordships a favourable decision.

May it therefore please your Lordships, to alter the Lord Ordinary's interlocutor; and to find, that your petitioner has a just claim to the sum for which he pursues; or, at least, if Mr. Dallas shall be allowed retention of the same, that he shall be obliged to secure it to your petitioner, in case of Mrs. Morison's predeceasing her husband.

According to justice, &c.

JAMES BOSWELL.